No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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October 6, 1987

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PETITIONERS REPLY BRIEF

INTRODUCTION

This case presents a conflict among the circuits[1] concerning the quantum of proof required to invoke the black lung interim presumption, 20 C.F.R. § 727.203 (1986). Petitioners ("Mullins")

1. The Third and Fourth Circuits continue to adhere to the rule that any single item of invocation evidence automatically invokes the presumption. The Sixth Circuit required proof of any invocation fact by a preponderance in *Back* v. *Director, Office of Workers' Compensation Programs*, 796 F.2d 169 (6th Cir. 1986), but later expressed uncertainty over application of a preponderance standard to invocation by medical opinion evidence, 20 C.F.R. § 727.203(a)(4). *Patton* v. *National Mines Corp.*, 825 F.2d 1035, 1037 (6th Cir. 1987). More recently, the Sixth Circuit seems to have resolved its uncertainty by holding clearly that the preponderance standard applies to invocation. *Prater* v. *Hite Preparation Co.*, No. 86-3653 (6th Cir. Sept. 22, 1987).

The Seventh Circuit affirmed single-item invocation in *Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F.2d 958, 962 (7th Cir. 1986). In a later case, however, the court stated that "[claimant] asks us to . . . fall in line with the Fourth Circuit's decision in *Stapleton*. But, because close cases of interpretation of an administrative regulation must be resolved in favor of the administrator's interpretation, we disagree with *Stapleton*. . . . The

contend that the presumption may be invoked by a black lung claimant only if an invocation fact is established by a preponderance of the evidence. This conclusion is compelled jointly and independently by the language of the rule, by the Secretary of Labor's longstanding and consistent interpretation of it, which deserves judicial deference, and by the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1982) ("APA").

The Federal Respondent ("Director") agrees that a preponderance rule applies and that the holding below should be reversed. The Director's brief details the logical pattern of invocation and rebuttal intended by the agency, Brief for Federal Respondent at 22-27, but differs with Petitioners on a few key points. The Director argues that a preponderance standard is consistent with and supported—but not compelled—by the APA. The agency also argues that the generally applicable preponderance rule is modified by a "true doubt" rule which permits the claim adjudicator to construe evidence in equipoise in favor of claimants, *id.* at 33-35. Finally, the Director agrees that the Fourth Circuit's decision will be quite disruptive, but suggests that it will not ultimately affect the result in most of the pending claims. Petitioners vigorously disagree with this speculation.

Respondent Ray[2] urges affirmance, echoing the Fourth Circuit's opinion. Respondent Westmoreland Coal Company argues for application of a preponderance of the evidence standard and reversal of the Fourth Circuit's decision.[3]

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regulation entitles the claimant to a presumption of black-lung disease only if an X-ray 'establishes' the disease, and whether it establishes it or not may depend on what other X-rays show . . . ." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1187 (7th Cir. 1987).

2. Respondent Cornett has filed no brief. Respondent Stapleton argues that the result in his case was not, in effect, supported by substantial evidence. This is outside the scope of the writ of certiorari and not properly before the Court. Supreme Court Rule 34.1(a). The decision in Stapleton's case is final and his arguments are moot.

3. Westmoreland's Brief at 14-15 appears to argue that application of a preponderance standard in the invocation analysis is compelled by *Steadman* v. *SEC*, 450 U.S. 91 (1981). Petitioners believe that *Steadman* is strongly supportive, but not controlling.

The National Coal Association filed a brief amicus curiae urging reversal on grounds of deference and non-compliance with APA protections. Importantly, this brief details the great difficulty encountered by mine operators in their efforts to rebut the presumption on the basis of obtainable evidence. Brief of the National Coal Association at 11-14.

The United Mine Workers of America ("UMWA") also filed a brief amicus curiae. Arguing for affirmance, it theorizes that the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1982) ("Act"), its early legislative history, and the plain language of the interim presumption support a single-item invocation rule. Brief of UMWA at 3-21.

I.
THE ACT AND ITS HISTORY NEITHER COMPEL NOR SUGGEST AN IRREBUTTABLE SINGLE-ITEM INVOCATION RULE

In the opening brief, Mullins argues that the language of Section 413(b) of the Act, 30 U.S.C. § 923(b) (1982), requiring the consideration of all relevant medical data "where relevant," strongly supports if not mandates the conclusion that a black lung factfinder must weigh conflicting evidence wherever in the analysis of the case the conflict is presented. An interim presumption claim is in no way excluded from the reach of this provision. The Director agrees. Brief for the Federal Respondent at 28. The UMWA argues that we read Section 413(b) too narrowly "as pointing to a specific chronological point in the evidentiary process." Brief of UMWA at 5 n.4. The plain language of the statute provides that relevant evidence is considered whenever it is relevant to the finding being made.

The briefs of the parties demonstrate that there is nothing in the Act which detracts in any way from application of a preponderance rule to an invocation analysis. One key provision, Section 413(b), directs the Secretary to require the weighing of

relevant conflicting evidence on invocation of the interim presumption, as elsewhere.[4]

Mullins also details the fact that *every* legislative reference post-dating the House/Senate Conference which produced the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), (which, inter alia, authorized the Secretary of Labor to write an interim presumption) emphasizes that, when applied in Labor Department claims, all relevant evidence submitted in the case is to be given full consideration. At no place is this mandate withdrawn from an invocation inquiry or otherwise restricted. There is no statement in the vast legislative history of this Act which even suggests the single-item invocation rule settled upon by the court below.

The claimant, respondents and the UMWA seek to construct a historical record for a proposition that was not under consideration by Congress. The Labor Department was directed to write its rule by the 1978 amendments to the Act. Citing a variety of general legislative statements dating from 1969 to 1972, reflecting Congress's undisputed intent to aid disabled miners and their families, the UMWA concludes that it has proven congressional endorsement of a single-item invocation rule. Brief of UMWA at 11-16. At the time these statements were made, there was no interim presumption and no legislation proposing such a provision. A legislative record which is so remote in both time and purpose is hardly an authoritative source of Congress's meaning.

4. The Seventh Circuit has considered the significance of the portion of § 413(b) that prohibits the Social Security Administration from employing "panels of second guessers" to reinterpret x-rays in Social Security black lung claims. *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185, 1186. Noting that this limitation on the right to cross-examine evidence does not apply in Part C (i.e., Department of Labor) claims, *see Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 36 (1976), and in light of the facts presented, the Seventh Circuit found the limitation inapplicable. Congress made it abundantly clear that the § 413(b) limitation on the right to cross-examine x-ray evidence was not to apply to mine owners. *See* Brief for Petitioners at 23 n.34.

It is apparent that there is no legislative source for a conclusion that Congress seriously considered, much less mandated, a single-item invocation rule.[5]

II.
RESPONDENTS IGNORE THE LANGUAGE OF THE RULE

Both Mullins and the Director point to the language in each invocation category that the evidence to be relied upon for invocation "establish" or "demonstrate" the requisite invocation fact, 20 C.F.R. § 727.203(a)(1)-(4) (1986). This usage reflects the Secretary's imposition of a preponderance of the evidence standard in the invocation inquiry. While not expressly stated, the Seventh Circuit finds similar meaning in these words. *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1187.

The argument stands largely unanswered. To the extent an answer is attempted, it rests on the illogical premise advanced in the plurality opinion of Judge Hall below (Pet. App. 22a, n.8), which suggests, without rationale, that the term "establish" means one thing on invocation and another on rebuttal. Brief of Ray at 10 n.2; Brief of UMWA at 4-5. The UMWA also theorizes that mine operators should not complain because they can prevent unreliable evidence from accomplishing invocation by challenging the number of years worked in mining or disputing the authenticity or quality of the single item on which the claimant seeks to rely.[6] Brief of UMWA at 8.

5. The Briefs of Respondent Ray and the UMWA add nothing new to the discussion of the Fourth Circuit's reliance on a law review article written by Mullins' counsel. There remains no basis on which to conclude that the article supports or proves the Fourth Circuit majority's thesis.

6. Among the bases for challenge suggested by the UMWA is to "dispute the qualifications of the medical source of a given piece of evidence." Other than by proof that the medical source is not, in fact, a medical source, we see no way to mount such a challenge. There is no basis in the Fourth Circuit's opinion on which to conclude that, for example, a local family doctor's reading of an x-ray is any less likely to mandate invocation than is the opinion of a Board-certified radiologist. The Fourth Circuit's holding is that "any" evidence

The duration of a miner's employment has no conceivable relevance to the reliability or probative value of the medical evidence relied upon.[7] Similarly, any dispute over the authenticity of the single item or its compliance with regulatory quality standards is pointless if the best evidence available to resolve these questions—the opinions of other, perhaps more expert, authorities or the results of better tests—is largely precluded from consideration. The viewing of single items of evidence, in isolation from the record, serves no useful purpose other than automatic invocation.

What respondents overlook is that the plain language of the presumption gives no automatic credence to any x-ray interpretation, test result or medical opinion. Within its terms, the presumption precludes reliance on a chest x-ray, autopsy or biopsy unless it proves pneumoconiosis (Section 727.203(a)(1)); or ventilatory studies unless they prove "chronic respiratory pulmonary disease" (Section 727.203(a)(2)); or blood gas tests unless they prove the existence of a blood gas transfer impairment (Section 727.203(a)(3)); or a medical opinion unless it proves, in fact, the presence of "a totally disabling respiratory or pulmonary impairment" and is both reasoned and documented (Section 727.203(a)(4)). Evidence proven false or inaccurate by any means simply cannot meet the standard. Whether any item of evidence meets an invocation standard depends upon what else is in the record. Invocation does not turn on whether the claimant is somehow able to obtain an abnormal x-ray or test or favorable report, but whether that x-ray, test, or report in fact evidences the requisite abnormality. *See, e.g., Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185 ("it is not the reading, but the X-ray, which establishes the presumption"). The language of the rule, taken as a whole, neither states nor

invokes no matter what the qualifications of the producer. *See also Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113, 1114 (4th Cir. 1986).

7. Further, the Third and Fourth Circuits have excused claimants from proving the duration of their coal mine employment. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987); *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983).

implies an intent to make the presumption available on uncontested and possibly false medical data.

III.
THE SECRETARY'S PREPONDERANCE RULE IS WORTHY OF DEFERENCE

Mullins' opening brief argues that all traditional rules compel deference to the Secretary's preponderance rule. Respondent Ray counters that the Secretary's interpretation is merely a "litigation position" that was not published in the *Federal Register*. Brief of Ray at 11. The UMWA agrees that the absence of a published formal statement of agency policy weakens the Secretary's claim and cites circuit court decisions purportedly demonstrating a lack of consistency in agency application of the rule. Brief of UMWA at 21-23.

A "litigation position," to which no deference is accorded, is a position advocated by counsel as distinct from the agency. Its existence may be discerned from a change in position during the course of litigation or from an absence of proof that the agency addressed and answered the question prior to litigation. *See Securities Indus. Ass'n* v. *Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984). *Cf. Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 634 (1983). It is perfectly clear that the preponderance of the evidence rule advocated here is a longstanding and consistently applied rule of the agency, not its lawyers. Brief for Federal Respondent at 36-37.

An agency's interpretation of a published rule need not, and probably should not, be separately published in the *Federal Register*. Ideally, the published rule should speak for itself with clarity.[8] The rule is clear enough here. But, if a rule is deemed ambiguous, deference may be accorded in light of the agency's position in prior litigation, *E.I. du Pont de Nemours & Co.* v.

8. Respondent Ray suggests that 5 U.S.C. § 552(a) (1982) requires publication of the interpretation as well as the rule. Brief of Ray at 11. The APA imposes no such requirement. Publication of the rule is sufficient.

Collins, 432 U.S. 46, 54-55 (1977); its actions in administering the rule, *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976); even by its arguments in this Court (so long as the interpretation is not solely that of counsel), *Bellotti* v. *Baird*, 428 U.S. 132, 143 & n.10 (1976); and by the many other factors previously discussed in Petitioners' opening brief at 32-33. In this case, all of these factors indicate that deference should be accorded the agency's interpretation.

Finally, the UMWA's reference to reported cases which purportedly do "not support the claim that there has been a consistent fifteen-year interpretation of the interim presumption," Brief of UMWA at 22-23, proves only that the presumption has not been consistently interpreted by the courts. The cases cited conclusively demonstrate that the agency was engaged in weighing invocation evidence and crediting the best evidence. Were that not so, those cases would not have proceeded from the administrative process to the courts.

No sound reason to decline deference has been identified.

IV.
TODAY, THE FOURTH CIRCUIT'S RULE MANDATES LIABILITY WITHOUT REGARD TO THE EVIDENCE

The Fourth Circuit majority holds that relevant evidence which is excluded from consideration in the invocation inquiry, including "nonqualifying X-rays, test results, and opinions," shall be considered in rebuttal and may suffice to rebut the presumption subject only to the statutory prohibition against denial by a single negative chest x-ray (Pet. App. 4a). The Director concludes from this holding that, since true doubt is resolved in favor of the claimant, the ultimate outcome in individual cases will not change whether the Fourth Circuit's or the Director's rule is applied. Brief for Federal Respondent at 16-17.[9]

9. The Director urges reversal because the Fourth Circuit's decision is wrong and will pointlessly disrupt ongoing litigation in thousands of claims. Petitioners agree. The Benefits Review Board has remanded hundreds of cases for retrial as a result of the Fourth Circuit's decision, and the numerous Administrative Law Judges' decisions reported in Volumes 9 and 10 of the *Black Lung*

The Director not only misstates and overemphasizes the rarely applied "true doubt" principle,[10] but also erroneously predicts the significance of this case.

Since certiorari was granted, both the Third and Fourth Circuits have made rebuttal virtually impossible in light of obtainable evidence and have largely abandoned the premise that invocation evidence ever would or could be considered in rebuttal. In one case, the Fourth Circuit reversed an Administrative Law Judge's ("ALJ's") denial of benefits. *Sykes* v. *Director, Office of Workers' Compensation Programs*, 812 F.2d 890 (4th Cir.

Reporter demonstrate the compelling power of automatic invocation at the trial level. It should be noted that very few of the thousands of ALJ and BRB decisions issued annually are published.

10. The true or reasonable doubt principle was not addressed in the proceedings below and has no application in these cases. It has been applied by the Benefits Review Board and advocated by Government counsel in *one narrow context*: If, on invocation only, the evidence is in perfect equipoise (e.g., two equally credible x-ray reports), an irreconcilable conflict may be resolved for the claimant. *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483 (Ben. Rev. Bd. 1978). The Benefits Review Board has never permitted application of a "true" or "reasonable" doubt rule on rebuttal, nor as far as we are aware has the Director ever argued for such application. "In the context of rebuttal, however, the [reasonable doubt] rule has little application since it is employer's burden to establish rebuttal. If the employer has fulfilled that burden, rebuttal is not defeated by evidence supportive of entitlement. It is not employer's burden to establish rebuttal beyond *all* doubt." *Highlander* v. *Westmoreland Coal Co.*, 5 Black Lung Rep. (MB) 1-339, 1-343 (Ben. Rev. Bd. 1982) (emphasis in original). *See also Waugh* v. *Valley Camp Coal Co.*, 6 Black Lung Rep. (MB) 1-430, 1-434 (Ben. Rev. Bd. 1983).

The reasonable doubt rule originated in a congressional report in which a Senate Committee directed the Secretary of Labor to write *regulations* which, in light of medical or scientific uncertainties, resolved doubts for the claimant. The doubt-resolving principle has no proper role to play in individual adjudications. *See* S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977); *Peabody Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 778 F.2d 358, 362 (6th Cir. 1985). If applied, the rule more often than not serves as an excuse to avoid weighing the evidence. If applied on rebuttal of the presumption, as the Fourth Circuit does, *Armentrout* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 2-88, 2-92 (4th Cir. 1987), the rule is pernicious in that it requires the employer to rebut "beyond a reasonable doubt." Such a standard has no place in civil litigation; it is not a standard employers can meet. An ALJ's decision based upon a resolution of doubt rather than a rational weighing of the evidence is also largely unreviewable on appeal.

1987). The denial was predicated upon a finding, supported by pulmonary function tests ("PFTs"), arterial blood gases ("ABGs"), and a medical opinion that claimant suffered no respiratory or pulmonary impairment and thus could not be deemed totally disabled by black lung disease. *Id.* at 892-93. PFTs and ABGs are used primarily to measure the severity of an individual's lung disease. Typically, the tests are not cause-specific and rarely can they either pinpoint or rule out black lung as a cause of the impairment measured. *See* Brief for Petitioners at 14-15. In reversing the denial of benefits, the Fourth Circuit held that those tests were irrelevant because proof of the absence of severe or totally disabling lung disease cannot rebut.[11] Rather, to accomplish this end, the employer must prove that the miner is not totally disabled "*for whatever reason*," whether or not that reason is black lung-related. 812 F.2d at 894 (emphasis in original). By this holding, the Fourth Circuit has relegated the objective pulmonary system tests to legal oblivion. Not only are unfavorable tests ignored on invocation, but they are incompetent rebuttal evidence as well.

In another case, the Fourth Circuit vacated a denial of benefits predicated upon an ALJ's conclusion that PFT and ABG tests showing no significant lung disease established rebuttal. *Adkins* v. *United States Dep't. of Labor*, 824 F.2d 287, 289-90 (4th Cir. 1987). The court held that what matters is whether the claimant is unable to work, not the reason for the disability. *Id.* at 290. *Accord Armentrout* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. at 2-92.[12]

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11. The Fourth Circuit's approach is very much like that of the Ninth Circuit which this Court rejected in *Bowen* v. *Yuckert*, 107 S. Ct. 2287 (1987). The Fourth Circuit has made the same generic error, as § 727.203(b) rebuttal tracks the SSA disability formula. It differs only in that the disability inquiry is limited to respiratory disease. The statutory connection is at 30 U.S.C. § 902(f)(1)(A), (C) (1982).

12. In at least one case decided prior to *Broyles*, the Fourth Circuit affirmed a finding of an absence of black lung disease based upon negative x-rays and medical opinions. *Long* v. *Itmann Coal Co.*, 10 Black Lung Rep. (MB) 2-145 (4th Cir. 1987).

More recently, the court held that the only way the interim presumption[13] can be rebutted is by proof that the miner "is either doing or capable of doing his usual coal mine work." *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329. It does not matter whether the inability is due to lung disease or coal dust disease, or whether the miner even has coal dust disease. Thus, most, if not all, of the invocation evidence has become irrelevant to a rebuttal inquiry in the Fourth Circuit. As the Seventh Circuit has observed, the version of the interim presumption employed in *Broyles* "cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185; *see also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 402 (7th Cir. 1987).

The Third Circuit follows approximately the same path. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, No. 87-3024, slip op. at 6-7 (3d Cir. Sept. 1, 1987).

Thus, in the Third and Fourth Circuits, a claimant may obtain the benefit of the presumption by untested and possibly false evidence and, on rebuttal, proof of the unreliability or falsity has little or no value.

More significantly, many hundreds of cases recently decided by the Board and ALJs conclusively demonstrate that the single-item invocation rule dramatically impairs industry's ability to defend a non-meritorious claim. This Court's observation in *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976), that the distribution of proof burdens is "rarely without consequence and frequently may be dispositive" is no less true here than elsewhere.

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13. Here the Fourth Circuit applied the Social Security Administration's interim presumption to Department of Labor claims, *i.e.*, 20 C.F.R. § 410.490 (1986), noting that it is more liberal than 20 C.F.R. § 727.203 (1986) in certain respects and that its application is therefore required in principle by 30 U.S.C. § 902(f)(2) (1982). Requests for extensions of time to petition for certiorari have been granted by this Court to the Solicitor General and certain intervenors in related cases. *Pittston Coal Group* v. *Sebben* (No. A-219); *Brock* v. *Sebben* (No. A-220).

V.
THE APA APPLIES AND CONTROLS

The APA is the statute which guarantees certainty and fairness in the conduct of administrative litigation. It ensures the co-equal status of the parties with respect to evidence and procedure. 5 U.S.C. § 559 (1982). We seek these rights. It is more than apparent that they are not forthcoming in individual adjudications. After fifteen years, interim presumption invocation remains unsettled; in at least two circuits, invocation is virtually guaranteed, whether or not the evidence favoring it is reliable, probative or substantial. In the Seventh Circuit, weighing of evidence is only permitted, not required, *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1187, and the ALJ is simply free to weigh evidence if so inclined. The Sixth Circuit, recognizing the confusion, now finds it necessary to seek the advisory opinion of the Benefits Review Board. *Patton* v. *National Mines Corp.*, 825 F.2d at 1038. The Third and Fourth Circuits have resolved the problem largely by closing the door to employers on both invocation and rebuttal. The standard of proof and quantum of proof required for rebuttal remain an enigma. In the Fourth Circuit, the employer surely seems saddled with proving rebuttal beyond a reasonable doubt. *Armentrout* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. at 2-92; (the Act "should be liberally construed so that all doubts are resolved in favor of the disabled miner"). *See also* Pet. App. 23a (Opinion of Hall, J.) ("employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment in order to rebut . . ." (emphasis in original)). The Sixth and Seventh Circuits are reluctant to address rebuttal proof standards. *York* v. *Benefits Review Board*, 819 F.2d 134, 138-39 (6th Cir. 1987) (petition for rehearing filed) (Celebrezze, J., concurring); *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1184. The standard in the Third Circuit is unclear. *See Pavesi* v. *Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965-66 n.15 (3d Cir. 1985). The Director's "doubt rule" is

hardly illuminating. Even if employers can assume that the burden of persuasion shifts after invocation, it remains extremely difficult to determine the quantum or even the nature of proof required to carry the rebuttal burden.

The APA is the logical key to restoring fairness and certainty in black lung litigation. "The [APA] is designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected." S. Rep. No. 752, 79th Cong., 1st Sess. 7 (1945), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 193 (1946) [hereinafter *APA Legislative History*]. Mullins does not contend that any provision of the APA restricts an agency's authority to allocate burdens or elements of proof consistent with its statutory mandate. We *do* contend that, once the agency designates which facts must be proven by which side, the party assigned the burden of proving the fact in question must, in an APA proceeding, do so by the weight of the reliable, probative and substantial evidence—that is, by a preponderance.

The legislative history of the APA and the decisions of this Court amply support this conclusion. Section 7(c), § 5 U.S.C. § 556(d) (1982), imposes a burden of going forward with a prima facie showing of any fact a party is required to prove. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403 & n.7 (1983); S. Rep. No. 752, *supra*, at 22, *APA Legislative History* at 208; *see also* United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 75 (1947) [hereinafter *Attorney General's Manual*]. For purposes of an APA proceeding, in which there is no jury, there is no authority for the proposition that a prima facie case on any proof element arises on a single piece of favorable evidence alone. The APA framers stated, "wherever the burden of proof is upon private parties . . ., their competent evidence . . . to that effect shall be presumed true unless discredited or contradicted by other competent evidence." H.R. 339, 79th Cong., 1st Sess. § 6(d),

reprinted in APA Legislative History, *supra* p.13, at 139, 143.[14] The burden of going forward to establish a prima facie case is not met by viewing one part of the record in isolation from the whole. Where one kind of evidence is relevant to a finding or conclusion, it must overcome other evidence of the same kind to achieve its purpose "and no *finding* or *conclusion* may be entered except upon evidence which is plainly of the requisite materiality and competence . . . ." S. Rep. No. 752, *supra* p.13, at 22, *APA Legislative History* at 208 (emphasis added). *See also id.* at 84-85, *APA Legislative History* at 270-71. "To the extent that cross-examination is necessary to bring out the truth, the party must have it." *Id.* at 85, *APA Legislative History* at 271.

If invocation of a presumption by proof of one set of facts requires an inquiry into a second, rebutting set of facts, it would seem obvious that a prima facie case for invocation must be sustained on consideration of the whole record. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-54 (1981). The conclusion is common sense, and the APA framers expected that common sense would be employed in construing the APA. S. Rep. No. 752, *supra* p. 13, at 22, *APA Legislative History* at 208. There is nothing in the APA which implies that any proof burden may be carried merely by the presentation of any evidence. Indeed, it would make no sense for the APA to so provide, since the traditional purpose of a minimal burden of production is merely to get the case to a jury and there is no jury in an APA proceeding. *See Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 255 nn.7, 8. But even in a jury trial, cross-examination of the plaintiff's witnesses is a right secured for the defendant. From their writings, it is clear that the APA's framers intended that a party seeking to invoke a presumption such as the interim presumption would be required to do so by a preponderance of the evidence.

The Director argues that he is not bound by the APA and, even if he were, the APA requirements are satisfied where the party

14. Although this language first appeared in the statutory formulation and was removed, its meaning surely remains relevant.

assigned the burden merely produces *any* evidence to carry it.[15] In asserting carte blanche exemption from the APA, the Director asks the Court to break new ground in interpreting 5 U.S.C. § 559 (1982). Relying on general regulatory authority in 30 U.S.C. § 932(a) (1982) authorizing the Secretary to conform incorporated Longshore Act provisions to black lung claims administration, it is suggested that this provision also authorizes the Secretary to pick and choose from among APA provisions those which he would like to use. This construction of Section 932(a) is at odds with the decisions of this Court interpreting 5 U.S.C. § 559, *see* Brief for Petitioners at 38 and cases cited therein; and it is at odds with the views of the circuits when they were presented with this same argument, *id.* at 39-40. It is at odds with the legislative history of the APA, *see* Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act* ____ (Comm. Print 1945), *reprinted in APA Legislative History*, *supra* p. 13, at 11, 43 (stating that "implied amendments shall be precluded"); *see also* S. Rep. No. 752, *supra* p.13, at 30, *APA Legislative History* at 216; 92 Cong. Rec. 2148, 2159 (1946) (statement of Sen. McCarren); *Attorney General's Manual*, *supra* p.13, at 139 (courts should construe APA provisions as applicable, absent clear statutory provisions to the contrary). It is at odds with the actions of Congress which, in 1976, believed it necessary, notwithstanding Section 932(a), to enact a special, limited APA exemption, *see* Brief for Petitioners at 40 n.54; and it

15. The Director argues (Brief for Federal Respondent at 35) that § 7(c) according to *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 403-04 n.7, merely requires the movant to bear a burden of production and that the preponderance rule, according to *Steadman* v. *SEC*, 450 U.S. 91, 95-104 (1981), applies only to the end result. Neither case clearly supports the Director's view and the Director's use of both begs the question. The *NLRB* footnote and the case cited therein acknowledge that § 7(c) determines the burden of going forward with a prima facie case. In *NLRB*, the General Counsel made such a case by a preponderance of the evidence and thereby shifted the ultimate burden of persuasion. *NLRB* speaks not at all to whether the Board might have further reduced the quantum of proof the General Counsel was required to present. *Steadman* involved no shift in burdens and speaks only to the quantum of proof required to support a finding generally.

is at odds with the expressed views of Congress in its 1977 review of Section 932(a).[16]

If there is any authority for construing Section 932(a) so broadly, it is not cited. But what is most troubling about the Director's argument is the proposition that the agency may extend or withdraw APA protections at will, either by rule or, as with the "true doubt" theory, by argument. The Director's request for a general APA exemption must be denied.

Finally, the UMWA attacks Petitioner's APA argument, citing *IT&T Corp.* v. *Local 134, IBEW*, 419 U.S. 428 (1975), for the proposition that invocation of the presumption is not part of a "final disposition" within the meaning of 5 U.S.C. § 551(6) (1982) and thus not an "adjudication" subject to the APA. Brief of UMWA at 27-29. In *IT&T*, the Court held that a non-binding advisory opinion entered under Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k) (1982), was not an APA-covered proceeding. 419 U.S. at 443-446. The UMWA claims that invocation of the interim presumption is analogous. It plainly is not. In fact, it fits *IT&T's* "prototype" for agency processes that are subject to the APA. Invocation follows "a hearing before an administrative law judge who makes findings of fact and conclusions of law, initially decides the case, and whose recommended decision 'becomes the decision of the agency . . . unless there is an appeal . . . .'" *Id.* at 445. If the presumption is invoked and not rebutted, the employer must pay benefits or appeal. There is nothing advisory about it. It is not in any way separate from the final determination. Invocation is an integral

16. S. Rep. No. 209, *supra* n. 10, at 18. "Subsection (e) [amendment to 30 U.S.C. § 932(a)] makes clear that any and all amendments to the Longshoremen's . . . Act (to the extent specified in Section 422(a)) shall be applied to claims proceedings under Part C. This includes the 1972 amendments relating to the use of Administrative Law Judges in claims adjudication." *Id.* Indeed, in 1978, a grandfather clause was enacted to permit non-ALJs who had been hearing claims to continue to do so for one year, to remedy the Secretary's inability to deviate from APA and Longshore Act requirements in this regard. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 7(h), 92 Stat. 95, 99-100 (1978). Congress obviously did not believe it had granted the Secretary the authority asserted.

part of the "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1982).

When Congress directed that APA protections apply to the "whole or a part" of an agency final disposition or sanction[17] it surely did not mean some parts but not others. The legislative history so states. In discussing the reach of Section 7(c), its framers intended not only that the totality of final disposition be subject to the APA, but that each individual finding or conclusion of which that disposition is composed be reached in accordance with the APA. *See* H.R. 339, *supra* p.13, §§ 6(d), 8(d), *APA Legislative History* at 143, 145-46; S. Rep. No. 752, *supra* p.13, at 22, 84-85, *APA Legislative History* at 208, 270-71; 92 Cong. Rec. 2148, 2157-58 (1946) (statements of Sen. McCarren). On judicial review under 5 U.S.C. § 706(2) (1982), the focus on individual findings and conclusions is reiterated.

The question presented here is not whether the APA applies. It surely does. Nor is the question whether invocation of the presumption is somehow separable from the order or sanction disposing of the case. It surely is not. The question here is whether under the interim presumption a claimant may meet the burden of going forward with a prima facie case, *i.e.*, whether he may establish an invocation fact without having his evidence scrutinized for its reliability, probative value and substantiality. For the reasons stated, Mullins submits that it was the intent of the APA's authors that such critical evidence would be so scrutinized at the point of greatest relevancy—in the invocation analysis.

17. The UMWA disputes Petitioners' classification of an award of black lung benefits as a "sanction" (which does not expressly require a "final disposition") rather than an "order," which does so require. A grant of compensation is clearly defined as a sanction, but the classification makes little difference. What is critical in 5 U.S.C. §§ 551(6) and (10)(E) (1982) is that both apply the APA to the whole of the proceeding *and* its identifiable parts.

CONCLUSION

The decision of the Fourth Circuit mandating liability on irrebuttable evidence should be reversed.

Respectfully submitted,

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October 6, 1987